SUBMISSION OF THE

THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

TO

THE AUSTRALIAN SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE

ON THE

COMMONWEALTH RADIOACTIVE WASTE MANAGEMENT LEGISLATION AMENDMENT BILL 2006

NOVEMBER 2006

Human Rights and Equal Opportunity Commission

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Introduction

The Human Rights and Equal Opportunity Commission ('the Commission') welcomes the opportunity to provide a submission to the Australian Senate Employment, Workplace Relations and Education Committee on the Inquiry into the *Commonwealth Radioactive Waste Management Legislation Amendment Bill 2006* ('the Bill').

This submission is relevant to the statutory functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner under the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* (HREOCA) and the *Native Title Act 1993* (the Act or NTA) which includes:

> (1) To report on the operation of the NTA and its effect on the exercise and enjoyment of rights by Aboriginal peoples and Torres Strait Islanders;[1]
>
> (2) To report on the enjoyment and exercise of human rights by Aboriginal peoples and Torres Strait Islanders, and recommend where necessary on the action that should be taken to ensure these rights are observed;[2]
>
> (3) To examine and report on enactments and proposed enactments to ascertain whether or not they recognise and protect the human rights of Aboriginal peoples and Torres Strait Islanders.[3]

The Commission is concerned the proposed amendments to the Act that:

- have the effect of further restricting access to scrutiny of ministerial decisions under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) process, and;
- the concomitant denial to Traditional Owners of their right to free, prior and informed consent as regards the positioning of radioactive waste storage facilities.

Background

On 15 July 2005, the then Federal Minister for Education, Science and Training, Dr Brendan Nelson announced:

> The Australian Government has finalised a list of possible locations for the siting of a future Commonwealth Radioactive Waste Management Facility. These are Defence Department properties at Mount Everard, Harts Range and Fishers Ridge in the Northern Territory.
>
> The process for selecting suitable sites followed the Prime Minister's announcement on 14 July 2004 that the Government would not proceed with the

[1] *Native Title Act 1993* (Cth) s 209
[2] *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 46C (1)(a)
[3] *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 46C (1)(d)

> establishment of a national low level radioactive waste repository at site 40a near Woomera in South Australia.[4]

The *Commonwealth Radioactive Waste Management Bill 2005* and the *Commonwealth Radioactive Waste Management (Related Amendments) Bill 2005* were introduced in the House of Representatives on 13 October 2005.

The Full Council of the Northern Land Council resolved on 20 October 2005 that:

> The Northern Land Council supports an amendment to the *Commonwealth Radioactive Waste Management Bill 2005* to enable a Land Council to nominate a site in the Northern Territory as a radioactive waste facility provided that:
>
> (i) The Traditional Owners of the site agree;
> (ii) Sacred sites and heritage are protected (including under current Commonwealth and NT legislation);
> (iii) Environment protection requirements are met (including under current Commonwealth and NT legislation);
> (iv) Aboriginal land is not acquired or native title extinguished (unless with the Traditional Owners' consent).[5]

The Bills were passed in the House of Representatives on 2 November 2005 with 12 amendments incorporating the resolutions of the Northern Land Council. The Bills were introduced into the Senate on 7 November 2005. On 9 November 2005, the Senate referred the Bills to the Senate Employment Workplace Relations and Education Legislation Committee for inquiry and report by 28 November 2005.

In their dissenting report, the Opposition Senators referred to what they described as the Government's mishandling of the inquiry with regard to the consultation process, and noted:

> A one-day inquiry held in Canberra did not allow the committee to visit the Northern Territory and the people most affected by this Bill. Hearings in Katherine, Alice Springs and Darwin would have been appropriate. Less than a week was allowed for lodging submissions. The hearing was held three days later allowing little time to scrutinise the 231 submissions. This report was scheduled for a week after the hearings, leaving manifestly inadequate time to prepare considered reports by either Government or Opposition Senators. This subversion of the Senate's democratic processes and effective law making reflects the Commonwealth's intentions in this Bill.[6]

The dissenting report quoted a submission from the Central Land Council:

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[4] Nelson, B (Minister for Education Science and Training), *Responsible management of radioactive waste in Australia*, Media Release, 15 July 2005, p1
[5] Northern Land Council, *Statehood setback over radioactive waste facility*, Media Release, 21 October 2005, p2
[6] Opposition Senator's Report, Senate Employment Workplace Relations and Education Legislation Committee, November 2005, p17

> Traditional landowners for both the Alcoota/Harts Range and Mt Everard sites are strongly opposed to the Commonwealth radioactive waste management facility being located at either site or on any part of their country, and instructed the CLC to assist them to oppose such a facility from proceeding.[7]

The *Commonwealth Radioactive Waste Management Act 2005* (CRWM) was enacted by the Federal Parliament in December 2005.

On 2 November 2006 the Federal Minister for Education, Science and Training, Ms Julie Bishop introduced the *Commonwealth Radioactive Waste Management Legislation Amendment Bill 2006*.[8]

The Commission is concerned that the Bill makes significant changes to the *Commonwealth Radioactive Waste Management Act 2005* (CRWM) which have the potential to:

- compromise the rights of Indigenous people living in the Northern Territory to make decisions based on free, prior, and informed consent; and
- negates the right to procedural fairness and natural justice by excluding and judicial review process under the *Administrative Decisions (Judicial Review) Act (Cth) 1977* regarding proposed sites for the location of a Commonwealth radioactive waste facilities.

International Human Rights and free, prior, and informed consent

Articles 1 of both the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) outline all peoples' rights to self determination:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Most recently, obligations relating to the effective participation of indigenous peoples have been synthesized into the principle of free, prior and informed consent by the United Nations Permanent Forum on Indigenous issues.

The UN Working Group on Indigenous Populations prepared a working paper defining each element of free, prior and informed consent. It is summarised below, and should set the standard for consultation:

- No coercion or manipulation is used to gain consent.

[7] Ibid, p23
[8] Minister for Education, Science and Training, the Honourable Julie Bishop MP *Hansard*, 2 November 2006, p1

- Consent must be sought well in advance of authorization by the State or third parties for activities to commence or legislation to be implemented that affects the rights of indigenous peoples.
- Full and legally accurate disclosure of information relating to the proposal is provided in a form that is understandable and accessible for communities and affected peoples.
- Communities and affected peoples have meaningful participation in all aspects of assessment, planning, implementation, monitoring and closure of a project.
- Communities and affected peoples are able to secure the services of advisers, including legal counsel of their choice and have adequate time to make decisions.
- Consent applies to a specific set of circumstances or proposal, if there are any changes to this proposal or to the circumstances this will renew the requirement for free, prior and informed consent in relation to the new proposal or circumstances.
- Consent includes the right to withhold consent and say no to a proposal.[9]

We are also currently in the 2nd International Decade for the World's Indigenous People. The Second Decade has five objectives which aim to promote non-discrimination and inclusion of Indigenous peoples in national processes regarding laws and policies that affect them. Importantly, these objectives promote the full and effective participation of Indigenous peoples in decision making.

The five objectives have been approved by the General Assembly and so provide a framework for cooperation and partnership at the international, regional and national levels:

1. Promoting non-discrimination and inclusion of indigenous peoples in the design, implementation and evaluation of international, regional and national processes regarding laws, policies, resources, programmes and projects;
2. Promoting full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent;
3. Redefining development policies that depart from a vision of equity and that are culturally appropriate, including respect for the cultural and linguistic diversity of indigenous peoples;
4. Adopting targeted policies, programmes, projects and budgets for the development of indigenous peoples, including concrete benchmarks, and particular emphasis on indigenous women, children and youth;

[9] UN Permanent Forum on Indigenous Issues Report of the *International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples*, New York, January 2005, para 23-26 incl., and Human Rights and Equal Opportunity Commission and United Nations Permanent Forum on Indigenous Issues, *Engaging the marginalised: Report of the workshop on engaging with indigenous communities*, HREOC, Sydney, <www.humanrights.gov.au/social_justice> (26 June 2006)

5. Developing strong monitoring mechanisms and enhancing accountability at the international, regional and particularly the national level, regarding the implementation of legal, policy and operational frameworks for the protection of indigenous peoples and the improvement of their lives.[10]

The Program of Action was adopted by consensus at the UN General Assembly. **Australia has agreed to act in accordance with, and promote these objectives**. They set appropriate parameters for policy making relating to decisions affecting indigenous peoples, either directly or indirectly.

United Nations Declaration on the Rights of Indigenous Peoples

The potentially serious impact of storage of hazardous materials on Indigenous lands necessitates a high level of participation by Indigenous peoples in decision making processes.

On 29 June 2006, the United Nations Human Rights Council adopted the *Declaration on the Rights of Indigenous Peoples* and recommended its adoption by the General Assembly.

Article 29 of that Declaration states (emphasis added):

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. **States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.**
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented. [11]

Australian domestic law

At the domestic level, the principle of free, prior and informed consent is built into the existing *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) through the requirement that in carrying out any action regarding Aboriginal land, Land Councils must be satisfied that the Traditional Owners understand the nature and purpose of the proposed action, and, as a group, consent to it.[12]

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[10]Second International Decade of the World's Indigenous People Resolution, *Resolution adopted by the General Assembly of the UN*, GA Res Document No. A/Res/59/174. Available online at: www.un.org/esa/socdev/unpfii/en/second.html. accessed 26 June 2006

[11] http://www.ohchr.org/english/issues/indigenous/docs/declaration.doc

[12] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (s.23 (3))

It is clear both internationally and domestically that there is a well established requirement for consultation and consent in respect of major changes to land rights, land access legislation, and in particular alienation of the freehold title granted by the *Aboriginal Land Rights (Northern Territory) Act 1976*. The failure to provide for such a process may be in breach the principles of self-determination, non-discrimination, equality before the law and the protection of minority group cultures.

Free, prior, and informed consent under the Act and the Bill

The existing *Commonwealth Radioactive Waste Management Act 2005* goes some way to ensuring the free, prior and informed consent of Traditional Owners in decisions concerning their land.

Under the Act, a nomination of land as a potential site, which may be made by either a Land Council or the Chief Minister of the Northern Territory, must contain evidence of consultation with Traditional Owners.[13]

For example, where a nomination is made by a Land Council, there must be evidence that:

- the relevant Land Council for the area has consulted with Traditional Owners;
- the Traditional Owners understand that nature and effect of the proposed nomination and things that might be done in relation to the land if the Minister approves the nomination;
- the Traditional Owners as a group have consented to the nomination; and
- any Aboriginal community or group that may be affected by the proposed nomination has been consulted and has had adequate opportunity to express its view to the Land Council.[14]

Where a nomination is made by the Chief Minister of the Northern Territory in relation to land that is the subject of an outstanding land claim under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), the nomination must also contain evidence that the Chief Minister has considered the expressed views of any Aboriginal community or group that may be affected by the proposed nomination.[15]

The Act also requires evidence of consultation in relation to sacred sites[16] and, for nominations by the Chief Minister of the Northern Territory, the consent of all persons holding interests in the land.[17]

The consultation process could be further enhanced by ensuring that permission is sought from adjoining tribes across whose land the radioactive waste must travel, and by incorporating a process whereby all Traditional Owners for a designated area must consent to storage and transport, rather than just a few.

[13] See s 3B.
[14] See s 3B(1)(g).
[15] See 3B(1B)(d).
[16] Section 3B(1)(e).
[17] Section 3B(1)(f).

The proposed amendments undermine the protection that these provisions provide to Indigenous people in two significant ways. First by providing that failure to comply with these requirements does not affect the validity of a nomination, and second by removing the entitlement to procedural fairness and statutory judicial review in relation to a nomination.

Non-compliance and invalidity

The Bill provides that failure to comply with the requirement for evidence of consultation in a nomination 'does not affect the validity of a nomination' or a subsequent declaration of a site by the Minister.[18]

The Commission is concerned that this removes an important imperative for compliance with the requirements that provide for the free, prior and informed consent of Indigenous people to significant decisions concerning their land rights.

In her Second Reading to the House of Representatives on the proposed Amendment Bill, the Minister assured the House that:

> Current provisions of the act set down a number of criteria that should be met if a land council decides to make a nomination. Importantly, these criteria include that the owners of the land in question have understood the proposal and have consented to the nomination, and that other Aboriginal communities with an interest in the land have also been consulted.
>
> I can assure the House that, should a nomination be made, I will only accept it if satisfied that these criteria have been met.[19]

While the Commission welcomes this assurance, it is not an enforceable guarantee of compliance with those requirements and is, in the Commission's view, inadequate to protect the rights of Indigenous people. The law, if amended by the Bill, will allow for a nomination and subsequent declaration to be valid in the absence of consultation with Traditional Owners. This is unacceptable.

Procedural fairness/natural justice and judicial review

The consultation requirements in the nomination provisions of the Act that presently go to ensuring the free, prior and informed consent of Traditional Owners are further undermined by the Bill's removal of the entitlement to procedural fairness and statutory judicial review in relation to nominations.[20]

[18] See Schedule 1, cl 3, 5.
[19] Minister for Education, Science and Training, the Honourable Julie Bishop MP *Hansard,* 2 November 2006, p1
[20] Schedule 1, cl 4.

The current Act removed procedural fairness in relation to the Minister's absolute discretion to approve nominated land as a site.[21] Similarly it is removed in the Minister's declaration of a site as a facility.[22]

Such decisions are also not subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)[23] ('ADJR Act').

The Bill goes further to exclude the entitlement of procedural fairness or the right to judicial review under the ADJR Act in relation to a nomination of land as a potential site for a facility.

The Federal Minister for Education, Science and Training sought to explain this amendment in her Second Reading to the House of Representatives as follows:

> A related purpose of this Bill is to amend both the act and the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to prevent politically motivated challenges to a land council nomination.[24]

Clearly the effects of the amendments do much more than that. They prevent legitimate challenges to a nomination based on grounds such as a denial of procedural fairness or other grounds of judicial review such as bias, bad faith, fraud or a lack of evidence.

This aspect of the Bill fundamentally compromises the requirement for consultation. The Bill therefore does not ensure free, prior and informed consent and accordingly do not provide adequate protection for the human rights of Traditional Owners.

Type of Radioactive Waste to be stored – 'Controlled material'

The Commission is also concerned that this Bill paves the way for the use of declared sites for the storage of high level radioactive waste.

The long title of the Act refers to a 'radioactive waste management facility'. 'Facility' is defined in the Act as a 'facility for the management of controlled material generated, possessed or controlled by the Commonwealth or a Commonwealth entity.'[25] The 'controlled material' definition specifically excludes high level radioactive material, or spent nuclear fuel.[26] In other words, the material that is presently contemplated being stored is low, to medium level radioactive waste.

[21] Commonwealth Radioactive Waste Management Act 2005 (Cth) s3D.
[22] Ibid, s8.
[23] Schedule 1, para (zc).
[24] Minister for Education, Science and Training, the Honourable Julie Bishop MP *Hansard,* 2 November 2006, p1
[25] Commonwealth Radioactive Waste Management Act 2005 (Cth) s3.
[26] Ibid.

However, to change the Act to allow for the storage of high level radioactive waste or spent nuclear fuel rods in a facility, there would merely need to be an amendment to the definition of 'controlled material'.

The Commission notes its view that such a change would negate any consent given by Traditional Owners to the location of a facility on their land. No such amendment should be made without full consultation of Traditional Owners and Land Councils.

Inadequate consultation in the context of this Bill

The Commission has stressed the need for engagement with Indigenous peoples in matters that concern their rights. This Bill has a potentially significant impact upon the rights of Indigenous peoples to be involved in decisions concerning their land.

The Commission therefore expresses its significant concern about the lack of adequate consultation in relation to this Bill. Submissions to this inquiry were called for by public advertisement on 13 November 2006[27] and were due only 9 days later on 22 November 2006. This is neither appropriate for meaningful consultation Aboriginal stakeholders, nor is it long enough, in the Commission's view, to adequately canvass the issues.

Conclusion

The proposed amendments disregard a number of current and pending international covenants and jurisprudential norms of domestic legislative and ministerial checks and balances. The effects of the amendments do not appear to have been fully thought through, nor has their import been subject to rigorous analysis or discussion by the people who will be most affected by them.

The Bill is an exercise in legislative and executive expediency. If implemented it will demonstrate a flagrant disregard for the Traditional Owners of the land on which radioactive waste dumps can be located. Such action puts Australia far behind in terms of our compliance with international human rights standards.

A Review of Uranium Mining, Processing and Nuclear Energy in Australia recently released a Draft Report that endorsed the building of up to 25 nuclear reactors.[28] High level radioactive waste and spent nuclear fuel will be generated from these reactors. It beggars belief that any existing Commonwealth radioactive waste facility would not be used to store this waste.

The Commission recommends that the Committee:

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[27] Senate Employment, Workplace Relations and Education Committee Radioactive Waste Management Bill, *The Australian.* 13 November, p2

[28] Commonwealth of Australia 2006, *Uranium Mining, Processing and Nuclear Energy — Opportunities for Australia?,* Report to the Prime Minister by the Uranium Mining, Processing and Nuclear Energy Review Taskforce, December 2006

- reject paragraph 1 of Schedule 1 of the Bill which removes the right to judicial review of site nomination decisions made under section 3A;

- reject paragraph 4 of Schedule 1 of the Bill which removes the entitlement to procedural fairness in the nomination process; and

- reject paragraphs 3 and 5 of Schedule 1 of the Bill to retain the necessity of compliance with the rules governing nominations as the basis for a valid nomination or ministerial declaration.